IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

# STATE OF TENNESSEE v. JAMES WESLEY NUCHOLS, IV

**Direct Appeal from the Circuit Court for Sevier County**
**No. 10338 Richard R. Vance, Judge**

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**No. E2005-00815-CCA-R3-CD - Filed June 12, 2006**

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The appellant, James Wesley Nuchols, IV, pled guilty in the Sevier County Circuit Court to aggravated robbery and contributing to the delinquency of a minor, with the length of the sentences and the manner of service to be determined by the trial court. After a sentencing hearing, the trial court sentenced the appellant to concurrent sentences of eight years for aggravated robbery and eleven months, twenty-nine days for contributing to the delinquency of a minor. On appeal, the appellant claims that the trial court erred by refusing to impose an alternative sentence such as split confinement or probation. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Amber D. Haas, Sevierville, Tennessee, for the appellant, James Wesley Nuchols, IV.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Al C. Schmutzer Jr., District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Factual Background

On January 11, 2005, the appellant pled guilty to aggravated robbery, a Class B felony, and contributing to the delinquency of a minor, a Class A misdemeanor. No evidence was presented at the sentencing hearing, and the parties relied on the presentence report. The report reflects that on June 29, 2004, the appellant used a pellet gun to rob a motel clerk at the Lodge South in Pigeon Forge, Tennessee. Soon after the robbery, a description of the getaway car was broadcast over the police radio, and a police officer stopped a maroon Chevrolet Caprice being driven by the appellant.

A thirteen-year-old boy was a passenger in the car. The appellant admitted that he robbed the motel, and the police found six hundred fifty-three dollars in the car. According to the appellant's statement in the presentence report, he was taking Clonazepam and Oxycodone at the time of the robbery.

The presentence report reveals that the then nineteen-year-old appellant attended Seymour High School but received his high school diploma in the Fall of 2004 by attending the Knox County Adult Evening High School. He reported that he was in fair physical health and that he had been prescribed the pain medications Darvocet and Hydrocodone for a cyst on his knee. The presentence report's investigating officer commented in the report that the appellant's having prescriptions for these drugs was "of concern" because the appellant had admitted to illegally abusing drugs in the past. In the report, the appellant stated that he began taking Oxycodone and Hydrocodone when he was seventeen years old and that he began using Clonazepam when he was eighteen. He stated that he stopped abusing the drugs in July 2004 after completing a drug treatment program. The appellant described his mental health as fair and stated that he was receiving treatment for depression and anxiety at the Helen Ross McNabb Center. He stated that he had previously experimented with alcohol but that he had not consumed any alcohol since he was eighteen years old. At the time of the report, the appellant was living with his parents and was working as a laborer for Propak.

The report shows that the appellant has prior convictions for driving on a suspended license, reckless driving, and misdemeanor theft. During the sentencing hearing, the State informed the trial court that the appellant had been on bond for one of those offenses at the time he committed the offenses in the present case. The report shows that in 2002, the appellant was charged in juvenile court with driving on a suspended license, criminal impersonation, speeding, and assault and that he was charged in juvenile court in 1998 with theft. However, the dispositions of those cases was unknown. Upon questioning by the trial court, the appellant acknowledged that he committed theft as a juvenile.

The trial court described the appellant's case as "troubling," given the appellant's youth, his juvenile court record, and his having been on bond when he committed the crimes in this case. The trial court noted that the appellant used a deadly weapon during the robbery and stated that "the propensity for such an offense, for people being killed, injured, are immense. Not only this clerk[,] Mr. Nuchols, [the] 13-year-old boy, [and] officers who would give pursuit. It was a dangerous, dangerous thing." To the appellant's credit, the trial court noted that he had obtained his high school diploma and had undergone drug treatment. However, the trial court stated that the appellant committed the current offenses while addicted to drugs and that it was "unfortunate" he did not get help for his drug addiction sooner. The trial court noted that the appellant previously had been on probation and that "it didn't stop the continued activity." It held that in light of all the factors, the appellant's criminal history justified confinement. The trial court also concluded that confinement was necessary to avoid depreciating the seriousness of the offenses. Regarding split confinement, the trial court stated that as a Range I, standard offender, the appellant would serve only thirty percent of the felony sentence and that "if the Court were to grant a split confinement, the amount of confinement would probably be as much as that time that you would serve in the Department of Corrections." The trial court ordered that the appellant serve the sentences concurrently and denied

his request for an alternative sentence.

## II. Analysis

The appellant claims that the trial court erred by denying his request for alternative sentencing. He argues that alternative sentencing was warranted in this case because he is young, cooperated with the police after the crimes, sought treatment for his drug problem, obtained his diploma after his arrest, was gainfully employed, and had the support of his family. The State claims that the trial court properly ordered the appellant to serve his sentences in the Department of Correction. We agree with the State.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

At the time of the appellant's March 2005 sentencing hearing, a defendant was eligible for alternative sentencing if the sentence actually imposed was eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003). Moreover, a defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a Range I, standard offender but was convicted of a Class B felony. See Tenn. Code Ann. § 39-13-402(a)(1), (b). Therefore, he is not presumed to be a favorable candidate for alternative sentencing. He also is entitled to no such presumption regarding his misdemeanor sentence. State v. Williams, 914 S.W.2d 940, 949 (Tenn. Crim. App. 1995). However, because he a received sentence of eight years or less, he may still be considered for alternative sentencing. See Tenn. Code Ann. § 40-35-303(a) (2003).

Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the

> seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

Initially, we note that the appellant has failed to include the guilty plea hearing transcript in the appellate record. The burden is upon the appellant to ensure that the record before this court conveys a fair, accurate, and complete account of what transpired in the court below with respect to those issues that are the bases of appeal. See Tenn. R. App. P. 24(b); see also State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993). While some of the basic facts underlying the appellant's offenses appear in the presentence report,

> the guilty plea hearing is the equivalent of trial, in that it allows the State the opportunity to present the facts underlying the offense. For this reason, a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed.

State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999). In any event, based upon the record before us, we can conclude that the trial court properly denied the appellant's request for alternative sentencing.

As the trial court noted, the appellant has a history of criminal activity. The presentence report reflects that the young appellant has prior adult convictions for driving on a suspended license, reckless driving, and misdemeanor theft. He also has illegally abused the drugs Oxycodone, Hydrocodone, and Conazepam. Although the appellant sought treatment for his drug problem, he did so only after he committed the aggravated robbery in this case. Moreover, as the presentence report's investigator noted, the fact that the appellant continues to take Hydrocodone, even for a medical condition, is troubling. The trial court noted that the appellant previously had been on probation but continued to commit crimes, and the trial court obviously concluded that this reflects poorly upon his potential for rehabilitation. As this court has said, "A felon's rehabilitation potential and the risk of repeating criminal conduct are fundamental in determining whether he or she is suited

for alternative sentencing." Id. We find no error in the trial court's denial of split confinement or probation.

## III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE